



December 22, 2016

Via FOIAonline

FOIA Officer
U.S. Environmental Protection Agency

Re: FOIA Request for EPA Records Regarding Oklahoma's Safe Drinking Water Act Compliance

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and EPA's implementing regulations, 40 C.F.R. §§ 2.100-2.406. NRDC seeks responsive records from both EPA Headquarters and Region 6.

I. Description of Records Sought

Please produce records¹ of the following types in EPA's possession, custody, or control:

1. All information relating to Oklahoma relied on by EPA in preparing its annual reports pursuant to 42 U.S.C. § 300-g(c)(3)(B) between 2010 and the present.
2. All quarterly and annual reports submitted by the State of Oklahoma to EPA pursuant to 40 C.F.R. § 142.15 between 2010 and the present.
3. All records related to EPA's annual reviews, conducted pursuant to 40 C.F.R. § 142.17 between 2010 and the present, of the State of Oklahoma's compliance with the requirements set forth in 40 C.F.R. § 142, subpart B, and the approved state primacy program.

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters offices, and specifically including EPA offices in possession of responsive records.

4. All records relating to EPA data audits, data verification, notes and memoranda memorializing agency file reviews, or audit reports of the State of Oklahoma's compliance with the requirements of the Safe Drinking Water Act between 2010 and the present.
5. All records relating to whether the Safe Drinking Water Information System/Federal Version (SDWIS-FED) accurately captures all drinking water violations in the State of Oklahoma between 2010 and the present.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. §2.107(l)(1). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. § 2.107(c)(1)(iii).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The requested records directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i). Under the federal Safe Drinking Water Act (SDWA), each state with primary enforcement responsibility under the statute (primacy state) is responsible for monitoring and ensuring compliance with national drinking water regulations. Each primacy state must, among other things, prepare and submit to the Administrator reports on violations of national primary drinking water regulations

by public water systems in the State, enforcement actions taken by the State, and variances or exemptions granted by the State. 42 U.S.C. § 300g-3(c)(3)(A)(i); 40 C.F.R. § 142.15(a)(1)-(3). Based on these reports, EPA compiles and publishes an annual national public water systems compliance report (EPA compliance report), which summarizes and evaluates the state reports and makes recommendations for improving state compliance. 42 U.S.C. § 300g-3(c)(3)(B). Further, EPA conducts additional reviews, audits, and compilations of state compliance with SDWA's requirements. The requested records all seek information that is directly connected to these governmental operations and activities.

2. *Informative value of the information to be disclosed*

The requested records are "likely to contribute to" the public's understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). The safety of public drinking water, and state and federal government's ability to protect citizens' access to safe drinking water, are topics of significant public interest and concern. A survey of EPA's compliance reports indicates that reports from the State of Oklahoma do not provide all requested information. *See, e.g., Providing Safe Drinking Water in America: National Public Water Systems Report*, US EPA, <https://www.epa.gov/compliance/providing-safe-drinking-water-america-national-public-water-systems-report> (last visited July 1, 2016) (containing EPA compliance reports for the years 1996-2013). Further, Oklahoma reports large numbers of violations each year; for instance, the State reported 2,393 violations in 2013 alone. EPA's assessment of these violations and the adequacy and completeness of Oklahoma's compliance reports will contribute to public understanding of Oklahoma's drinking water oversight and compliance.

There is more than a reasonable likelihood that these records have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). In recent years there has been substantial public interest in, and media scrutiny of, drinking water quality throughout the United States. *See infra* Section A.4. Yet, it appears that the records requested are not currently in the public domain.² Their disclosure would thus educate the public with respect to: the extent to which public water systems in Oklahoma have met SDWA standards for the years in question; the results of data verification and audit efforts to ensure that Oklahoma's reports are accurate and comprehensive; and the

² If EPA were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

extent to which the state and EPA have coordinated efforts to ensure protection of public drinking water systems. More broadly, these disclosures would meaningfully inform public understanding of the extent to which states and EPA promote a culture of compliance with the SDWA, and the potential risk of future drinking water crises.

3. *Contribution to an understanding of the subject by the public is likely to result from disclosure.*

Because NRDC is a “representative of the news media,” as explained in Part II.C below, EPA must presume that this disclosure is likely to contribute to public understanding of its subject. 40 C.F.R. § 2.107(l)(2)(iii).

However, even if NRDC were not a media requester, NRDC’s expertise in drinking water-related matters, extensive communications capabilities, and proven history of disseminating information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its members and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC’s more than two million members and online activists are “a broad audience of persons interested in the subject” of drinking water quality, 40 C.F.R. § 2.107(l)(2)(iii), and when combined with NRDC’s communications to the public at large, the likely audience of interested persons to be reached is certainly “reasonably broad.” *Id.* As NRDC’s long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org>, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- NRDC updates and maintains several social media accounts: Facebook (over 500,000 followers), Twitter (approximately 200,000 followers), Instagram (approximately 40,000 followers), YouTube (approximately 20,000 subscribers), and LinkedIn (approximately 10,000 followers). We also use Medium as another distribution channel for our content (approximately 1,500 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell);
- Issue brief, "The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater," June 2014 (co-authored by NRDC Water Program

- Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); *see also* "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates);
- Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);
 - Article, "Don't Buy the Smear of the EPA," *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke);
 - Transcript, "Conservationists Call For Quiet: The Ocean Is Too Loud!" Nat'l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny);
 - Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012;
 - Article, "Pollution Still a Hazard to U.S. Beaches," CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner);
 - Conference brochure, "World Business Summit on Climate Change," May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9);
 - Article, "Is there a 'proper level' of compliance with environmental law?" *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall);
 - NRDC Policy Library, <http://docs.nrdc.org/>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are "generally recognized as safe." *See also* Kimberly Kindy, "Are secret, dangerous ingredients in your food?" *Wash. Post*, Apr. 7, 2014 (discussing NRDC's report).

- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA's part to ensure the safety of these drug additives. *See also* P.J. Huffstutter and Brian Grow, "Drug critic slams FDA over antibiotic oversight in meat production," *Reuters*, Jan. 27, 2014 (discussing NRDC's report).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report); *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).
- (4) NRDC incorporated information obtained through FOIA into a report on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). The report also relied upon and synthesized information from other sources. Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.,* "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, *All Things Considered*, July 24, 2007.
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004.

- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents. NRDC's efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22.
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002; Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19.

Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *See* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).³

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons, including information about drinking water in particular. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

4. Significance of the contribution to public understanding

The records requested shed light on a subject of considerable public interest and concern: drinking water quality, specifically the extent to which states and the EPA are

³ There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. *See, e.g.*, Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005; Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *N.Y. Times*, Aug. 22, 2003; Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *N.Y. Times*, Apr. 27, 2002.

fulfilling their statutory obligations under the SDWA to ensure safe drinking water, especially in light of recent drinking water crises. As reflected in the examples below, there is substantial public interest in these matters:

- The Times Editorial Bd., Editorial, Our Poor Water Quality, *N.Y. Times*, Feb. 16, 2016, available at <http://www.nytimes.com/2016/02/16/opinion/our-poor-water-quality.html>
- Caitlin McGlade, Report: EPA needs better drinking water oversight, *The Arizona Republic*, Mar. 28, 2016, available at <http://www.azcentral.com/story/news/local/arizona-investigations/2016/03/22/report-thousands-arizona-may-drink-unsafe-water/82123676/>
- Angie Haflich, Millions of Americans at risk for lead exposure from drinking water, *High Plains Public Radio*, Dec. 14, 2016, available at <http://hppr.org/post/millions-americans-risk-lead-exposure-drinking-water>
- Midland Daily News, Our view: What do you know about Midland's water quality, *Houston Chronicle*, Mar. 21, 2016, available at <http://www.chron.com/opinion/editorials/article/Our-view-What-do-you-know-about-Midland-s-water-6898807.php>
- Michael E. Young, In light of Flint, Mich., water worries, how does Dallas area supply stack up?, *The Dallas Morning News*, Jan 21, 2016, available at <http://thescoopblog.dallasnews.com/2016/01/with-water-worries-in-flint-how-does-dallas-area-supply-stack-up.html/>

Public understanding of these matters would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to know whether the State of Oklahoma is fulfilling its statutory duties under the SDWA, whether the state has complied with federal drinking water quality standards during recent years, and whether EPA is doing anything to ensure state compliance with reporting requirements and other responsibilities. This information is particularly important to the public given President-elect Trump's announced plan to nominate Oklahoma Attorney General Scott Pruitt to lead EPA. Disclosure would help the public evaluate a potential cabinet member's commitment to complying with federal law and the potential risk of a future drinking water crisis.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered

by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about SDWA compliance. As noted at Part II.A, any work done by EPA in administering the SDWA, and by Oklahoma pursuant to its primary enforcement responsibility, relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of drinking water quality, particularly in the State of Oklahoma, and state compliance with federal drinking water standards. It will also contribute substantially to the public’s understanding of the relationship between EPA and the states in attempting to achieve compliance.

C. NRDC Is a Media Requester

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA’s FOIA regulations, 40 C.F.R. § 2.107(c)(1)(iii); see also 40 C.F.R. § 2.107(b)(6) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (granting NRDC media requester status) (available upon request).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. See 40 C.F.R. § 2.107(b)(6) (“Examples of news

media include . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues; through daily news messaging on “Twitter” and “Facebook”; and through content distributed to outlets such as Medium. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).⁴

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

⁴ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$100. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

/s/ Sarah Fort

Sarah Fort

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